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No. 98-131

In The

Supreme Court of the United States

October Term, 1997

THE UNITED STATES OF AMERICA,

Petitioner,

vs.

SUN-DIAMOND GROWERS OF CALIFORNIA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A), which renders unlawful the giving of anything of value to a public official "for or because of any official act performed or to be performed," criminalizes the giving of a thing of value to a public official where the gift is not motivated, caused by, connected or otherwise related to "any official act"?

PARTIES TO THE PROCEEDINGS

The Respondent Sun-Diamond Growers of California ("Sun-Diamond") is a California cooperative owned by four individual member cooperatives: Diamond Walnut Growers, Sun-Maid Growers of California, Sunsweet Growers, and Valley Fig Growers. Sun-Diamond has no nonwholly owned subsidiaries.

The Petitioner is the Independent Counsel on behalf of the United States of America.

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APPENDIX

Appendix A — Order Of The United States Court Of Appeals For The District Of Columbia Circuit Dated March 20, 1998 ..... 1a

OPINIONS BELOW

The petition accurately reflects the opinions below. Copies of these opinions are located in the Appendix to the Petition for Writ of Certiorari ("Pet. App."). In addition, the Court of Appeals' Order dated July 17, 1998, amending the court's March 20, 1998, decision is attached hereto as Opposition Appendix A.

JURISDICTIONAL STATEMENT

The Court of Appeals' decision does not directly conflict with that of any other United States Court of Appeals or this Court. Nor does the petition otherwise raise an important federal question warranting this Court's discretionary review.

STATUTORY PROVISIONS INVOLVED

This controversy involves the federal gratuity statute, 18 U.S.C. § 201(c)(1)(A) ("gratuity statute"), which provides in pertinent part:

> Whoever . . . otherwise than as provided by law for the proper discharge of official duty . . . directly or indirectly gives, offers or promises anything of value to any public official, former public official, or person selected to be a public official, for or because of any official act performed or to be performed by such public official, former public official, or person selected to be a public official . . . shall be fined under this title or imprisoned not more than two years, or both.

Congress specifically defined "official act" as

> any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3).

STATEMENT OF THE CASE

Sun-Diamond is a California agricultural cooperative owned by four individual member cooperatives,[1] which in turn are

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1. The Court of Appeals erroneously stated that Sun-Diamond is owned by five member cooperatives. *See* Pet. App. 1-2. One of the five member cooperatives has no ownership interest in Sun-Diamond.

collectively owned by approximately 5,000 individual growers. The conduct at issue stems from the relationship between Sun-Diamond's former Senior Vice President, Richard Douglas, and former Secretary of Agriculture Alphonso Michael Espy. As the Court of Appeals recognized, this relationship extended beyond business acquaintances. Pet. App. 2. Douglas "had a long-time friend in Mike Espy — the two had gone to college together at Howard University and had stayed close in the years since." *Id.*; *see also* Petition for Certiorari ("Pet.") at 3.

On June 13, 1996, a grand jury, acting at the behest of the Independent Counsel,[2] returned a nine-count indictment against Sun-Diamond. Counts I and II of the indictment charged that Sun-Diamond (through Douglas) gave approximately $9,000 in illegal gratuities to Espy. 18 U.S.C. §§ 2, 201(c)(1)(A).[3] Specifically, Count I — the only Count at issue in the petition— alleged that Sun-Diamond expended on Espy's behalf $2,295 for tickets to the 1993 U.S. Open Tennis Tournament, $2,427 for luggage, $665 for meals, and $524 for a framed print and a crystal bowl. Pet. App. 4.

The indictment further alleged that two Department of Agriculture matters affected, among others, Sun-Diamond. Pet. App. 3-4. Noticeably absent from the indictment, however, was any allegation that the gifts were given to Espy "for or because of" either of these matters. Due to this deficiency, Sun-Diamond moved to dismiss Count I on the grounds that the gratuity statute — by prohibiting gifts to public officials "for or because of any official act performed or to be performed by such public official" — requires the prosecutor to allege and to prove some nexus between the alleged gratuities and the Department of Agriculture matters purportedly affecting Sun-Diamond. Pet. App. 38-51. In denying Sun-Diamond's motion, the District Court disregarded the "official act" language, concluding instead that

---

2. On September 9, 1994, the Special Division for the Appointment of Independent Counsels appointed Donald C. Smaltz Independent Counsel to investigate alleged violations of the federal gratuity statute by Espy. *See* 28 U.S.C. § 593(b).

3. Counts III and IV alleged wire fraud. 18 U.S.C. §§ 2, 1343, 1346. Counts V through IX alleged illegal corporate campaign contributions in the name of another amounting to $4,000, in violation of the Federal Election Campaign Act. 2 U.S.C. §§ 441b(a), 441f, 437g(d)(1)(A); 18 U.S.C. § 2.

> it is sufficient for the indictment to allege that the provider of the gratuity has matters within the purview of the official receiving the gratuity, and that the gratuity be provided "simply *because* of . . . [the] official['s] position, in appreciation of th[e] relationship, or in anticipation of its continuation."

Pet. App. 42 (emphasis in original) (citation omitted).

Based upon this so-called "status gratuity" standard, the District Court instructed the jury that it could convict Sun-Diamond if the company gave things of value to Espy merely to "keep [him] happy," even if Sun-Diamond did not intend the gifts to relate in any way to any official act:

> *The essence of the crime is the official's position* of [sic] as the receiver of the payment not whether the official agrees to do anything in particular, that is, not whether the official agrees to do any particular official act in return. Therefore . . . to prove that a gratuity offense has been committed, it is not necessary to show that the payment is intended for a particular matter then pending before the official. *It is sufficient if the motivating factor for the payment is just to keep the official happy or to create a better relationship in general with the official.*
>
> * * *
>
> It is sufficient if Sun-Diamond provided Espy with unauthorized compensation *simply because he held public office.*
>
> * * *
>
> In order for you to convict Sun-Diamond of violating the gratuity statute, you must find beyond a reasonable doubt that Sun-Diamond gave the gifts to Mr. Espy *for or because of Mr. Espy's official government position* and not solely for reasons of friendship or social purpose.
>
> * * *
>
> [T]he government must prove that Sun-Diamond Growers of California, acting through its senior vice president for corporate affairs, Richard Douglas, and

> knowingly and willingly gave the gratuities, as least in part, *because of the Secretary's position in appreciation of Sun-Diamond Growers of California's relationship with him as a public official or in anticipation of the continuation of its relationship with him as a public official. The government need not prove that the alleged gratuity was linked to a specific or identifiable official act or any act at all.*

Pet. App. 6-7 (emphases added by the Court of Appeals).[4]

On September 24, 1996, the jury found Sun-Diamond guilty of the crimes alleged in Counts I and III through IX, and acquitted Sun-Diamond of the gratuity allegation in Count II. Sun-Diamond appealed its convictions to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals reversed and remanded Sun-Diamond's Count I gratuity conviction.[5] Pet. App. 31.

SUMMARY OF THE ARGUMENT

The issue raised in the petition does not warrant Supreme Court attention for three reasons. First, the Court of Appeals' decision is consistent with this Court's precedent, as well as with all other federal circuit court decisions that have addressed the gratuity statute. The out-of-circuit and Supreme Court precedent cited by the Independent Counsel either support the decision below or fail to address the precise question presented in the petition.

Second, given the relative dearth of gratuity cases, especially those specifically addressing the statute's "for or because of any official act language," the issue raised in the Independent Counsel's petition does not, at least at this time, involve an important federal question warranting Supreme Court attention. The Court of Appeals' decision, which does nothing more than resolve a jury instruction

4. The District Court rejected Sun-Diamond's proposed instruction that the "giving, offering, or promising things of value to Mike Espy unrelated to the performance of any official act is not prohibited by the gratuity statute." *See* Defendant's Proposed Jury Instructions to Which the Government Has Not Agreed at 33 (filed September 9, 1996).

5. The Court of Appeals also reversed Sun-Diamond's sentence but affirmed the convictions for the offenses alleged in Counts III through IX. *See* Pet. App. 14-31.

issue in connection with a fact-intensive prosecution, should be allowed to percolate through the Courts of Appeals before any Supreme Court intervention. Moreover, the Independent Counsel's policy concerns are addressed by other statutes, regulations or other sanctions and, in any event, involve matters that should be raised before Congress, not this Court.

Finally, the Court of Appeals' decision carefully addressed the question presented and supported its holding with a detailed and properly reasoned analysis. Despite the Independent Counsel's arguments to the contrary, the "for or because of any official act performed or to be performed" language means what it says and requires something more than a finding that gifts to a public official were for or because of the official's position. Moreover, the statute's legislative history and ample legal precedent support the Court of Appeals' conclusion that the prosecutor must prove a connection — *some* connection — between the thing of value given to a public official and an official act.

REASONS FOR DENYING THE WRIT

The Court of Appeals concluded that the federal gratuity statute — which requires a jury to find beyond a reasonable doubt that the defendant gave things of value to a public official "for or because of any official act performed or to be performed" — "means what it says." Pet. App. 12. This plain language requires some link, even if not an explicit *quid pro quo*, between the gift and an "official act." Accordingly, the Court of Appeals found that the District Court misinstructed the jury that Sun-Diamond violated the gratuity statute by giving a thing of value to Espy merely because of his position. *See* Pet. App. 10.

I.

THE COURT OF APPEALS' DECISION DOES NOT CREATE A SPLIT IN THE CIRCUITS ON THE PRECISE ISSUE RAISED HERE.

The Independent Counsel asserts that the Court of Appeals' decision conflicts with the decisions of other circuits.[6] But this

6. The Independent Counsel further contends that "the D.C. Circuit itself pointed to decisions from four other circuits that conflict with its decision in this case." Pet. at 12-13 (citing Pet. App. 11). But this is not the

(Cont'd)

assertion cannot withstand scrutiny, as authority from these circuits is either consistent with the Court of Appeals' decision or construes issues tangential to the one raised here.

Contrary to the Independent Counsel's spin of Ninth Circuit precedent, that Circuit has held, consistent with the Court of Appeals' decision below, that the gratuity statute renders unlawful the giving of gifts to a public official upon a showing of some nexus or connection between the alleged gift and some "act" or "decision." In *United States v. Alessio*, 528 F.2d 1079 (9th Cir.), *cert. denied*, 426 U.S. 948 (1976), the defendant was convicted for paying the vacation expenses of the administrator of the prison camp in which the defendant's father was incarcerated. After quoting the gratuity statute and the definition of "official act," the Ninth Circuit explained that the jury "could" have found that the gifts were given "for or because of" the official's "exercise" of his authority:

> To support the jury's verdict the evidence must show that something of value was given [to] "a public official . . . for or because of any official act performed or to be performed by such public official . . . ." 18 U.S.C. § 201(f).[7] An "'official act' means any decision or action on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in his official capacity, or in his place of trust or profit." 18 U.S.C. § 201(a).
>
> * * * *
>
> The jury *could* fairly conclude from the record herein that things of value were given [to the camp administrator] by appellant "for or because of" [the administrator's] *exercise* of [his] authority; that is, "for or because of any official act performed or to be performed by" [the official].

(Cont'd)
case, as the Court of Appeals merely acknowledged that *the Independent Counsel* "points to" cases from other circuits "*apparently holding* that gifts motivated solely by the recipient's official position may be illegal gratuities." Pet. App. 11 (emphasis added) (citations omitted).

7. 18 U.S.C. § 201(f) is a predecessor gratuity statute.

Id. at 1082 (emphasis added). There exists a world of difference between one's authority and one's exercise of that authority. The Ninth Circuit required a finding of both: first, that the recipient had the authority to perform an official act, and second, that the gift was in fact provided because of the official's "exercise" of that authority, *i.e.*, by performing some "official act." As reflected by the word "could," the court left both of these fact questions to the jury. Because the District Court in the instant case required the jury to convict on materially less proof than that in *Alessio* — *i.e.*, without any evidence of some connection between any gift given to Espy and any official act — the Court of Appeals properly held that the District Court's instructions were deficient.

The Ninth Circuit's decision in *United States v. Strand*, 574 F.2d 993 (9th Cir. 1978), also supports Sun-Diamond's position. *Strand* is a bribery case that explained the distinction between a bribe and an unlawful gratuity. The Independent Counsel omits from the petition a portion of the holding that renders *Strand* consistent with the decision below:

> The gratuity portions [of 18 U.S.C. § 201] require only that the thing of value be given or accepted "otherwise than as provided by law for the proper discharge of official duty," *thus covering instances where the public official would carry out the act or omission whether or not he received the thing of value.*

Id. at 995 n.2 (emphasis added); *compare* Pet. at 15. The emphasized language plainly denotes the Ninth Circuit's requirement that the gratuity statute requires a link between the gift and an "act or omission" that would have been performed (or not performed) regardless of the gift.

Nor does Sixth Circuit precedent conflict with that of the Court of Appeals below. In *United States v. Gorman*, 807 F.2d 1299 (6th Cir. 1986), *cert. denied*, 484 U.S. 815 (1987), the defendant, an Assistant United States Attorney ("AUSA"), was convicted of accepting loans from an individual who would have benefitted financially from the defendant-AUSA's prosecution of a third party. The court first rejected the defendant's argument that the loans were not "things of value" because the defendant repaid them. Then the court — citing specific "official acts" for which the loans were given — found that the evidence was sufficient to prove that the

defendant received gratuities "for or because of any official act performed or to be performed by him." *Id.* at 1305. Specifically, "evidence was presented which showed that [the AUSA] repeatedly threatened [the giver of the gratuity] that his investigation of [a bankruptcy matter] would end if he did not receive the loans he requested." *Id.* Termination of an official investigation, of course, constitutes an "official act" as that term is defined in § 201(a). Most significantly, the jury was accorded the prerogative of determining whether the gift was "for or because of any official act performed or to be performed" rather than having that factual question determined by some irrebuttable presumption, *i.e.*, that a gift to an official who has authority over the giver *must necessarily* have been provided for or because of an "official act."

The Second Circuit cases cited by the Independent Counsel either support Sun-Diamond's position or are inapposite. First, *United States v. Irwin*, 354 F.2d 192 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966), virtually mirrors the Court of Appeals' analysis when holding that the jury must find that the defendant gave the gifts to a public official with the intent to link the gift to an official act:

> [The federal gratuity statute] requires that the Government, to convict an accused, must prove that the purpose which he had in mind in making or promising to make a gift to a public official was to give additional compensation or a reward, gratuity or similar favor, *by reason of some "official act performed or to be performed by such public official."* It is not necessary for the Government to show that the gift caused or prompted or in any way affected the happening of the official act or had anything to do with its nature or extent or the manner or means by which it was performed. *The making of the gift "for or because of any official act" limits the prohibition against the act of making a gift to a public official to those which are accompanied by and are made with this particular state of mind, design or purpose, which is the essence of intent.* Whether this is regarded as a specific intent or as a limitation on the acts that are within the purview of the subsection is of no consequence. *The state of mind with which the act is done is an essential element of the offense which the Government must prove.*

Id. at 197 (emphases added). In other words, the gift does not have to influence or cause the official act; rather, the gift merely needs to be made because of the official act. *See* Pet. App. 8 ("the gratuity statute by its terms does still require at least a unidirectional relationship — the gift must be 'for or because of' the act."). As the Second Circuit observed in *Irwin*, Congress enacted the gratuity statute *not* to felonize the giving of *all* gifts to government officials, but instead

> to prohibit an individual, dealing with a Government employee in the course of his official duties, from giving the employee additional compensation or a tip or gratuity *for or because of an official act already done or about to be done.*

Id. at 196 (emphasis added).[8] 354 F.2d at 198 n.3 (emphasis added) (quoting jury instructions). The Second Circuit in *Irwin*, like the Ninth Circuit in *Alessio* and *Strand*, and the Sixth Circuit in *Gorman*, far from representing a split among the circuits, reaffirms the very principles set forth in the Court of Appeals' decision.

Nor do the other cited Second Circuit cases conflict with the Court of Appeals' decision. The most recent Second Circuit case, *United States v. Biaggi*, 853 F.2d 89 (2d Cir. 1988), *cert. denied*, 489 U.S. 1052 (1989), devotes substantial effort to discern the proper scope of the term "official act." After quoting from the statute and noting that the term requires "any decision or action," the *Biaggi* Court rejected Congressman Biaggi's claim that the term was confined to only "legislative acts." *Id.* at 97. Accordingly, the Second Circuit concluded that his efforts on behalf of his constituent, Coastal Dry Dock and Repair Company ("Coastal"), regarding monies Coastal owed to the

8. The jury instructions considered in *Irwin*, in sharp contrast to the instructions in *Sun-Diamond*, specifically required a nexus between the gift and some official act:

> [T]his crime does not require the evil intent or the corrupt intent that the first crime [bribery] requires, nor does it have to have as a purpose the intent to influence the public official *but rather to have as a reason for the giving of the money the performance by the recipient of some official act, namely, the audit examination of the returns in question.*

354 F.2d at 198 n.3 (emphasis added) (quoting jury instructions).

Brooklyn Navy Yard Development Corporation, constituted "official acts." These acts included the Congressman *calling* the Deputy Mayor of New York on at least three occasions, *writing* to the Mayor at least twice, *calling* the Commander of the Coast Guard, and *calling* and *meeting* with a United States Senator. *Id.* at 92-94. The Second Circuit, finding that nothing in the law "precluded the jury from considering Biaggi's intercessions as official acts," affirmed the conviction. *Id.* at 98. In doing so, the court put to rest the question of whether there must be a link between the gift and an official act, finding that affirmance was appropriate "so long as, from the inferences reasonably drawn, the jury might fairly have found the *requisite connection* beyond a reasonable doubt." *Id.* at 99 (emphasis added).

The Independent Counsel's reliance upon other, older Second Circuit precedent is misplaced. *United States v. Umans*, 368 F.2d 725 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967), merely held that a defendant may not be convicted of *both* an unlawful gratuity *and* bribery for the same conduct because a gratuity violation is a lesser included offense of bribery. *Id.* at 730. Moreover, *United States v. Barash*, 412 F.2d 26 (2d Cir.), *cert. denied*, 396 U.S. 832 (1969), is inapposite as it construed whether economic coercion is a defense to a gratuity violation. *Id.* at 29-30. No such defense was raised here.[9]

The Independent Counsel also cites to two Third Circuit cases, neither of which supports his position. In *United States v. Niederberger*, 580 F.2d 63 (3d Cir.), *cert. denied*, 439 U.S. 980 (1978), the court addressed the sufficiency of the allegations in the indictment; it did *not* address the propriety of jury instructions, which is the only issue raised in the Independent Counsel's petition. In any event, *Niederberger* actually supports the Court of Appeals' decision.

Niederberger, an Internal Revenue Service ("IRS") agent, was prosecuted for accepting golfing trips from a company he was in

9. Of course, to the extent *Umans* or *Barash* may be deemed to contain ambiguous language, the Second Circuit's position may be presumed to be found in its most recent articulation of the gratuity standard — that found in *Biaggi*, which was decided in 1989, more than 20 years after *Umans* and *Barash* were decided.

charge of auditing. After rejecting Niederberger's argument that the gratuity statute requires a *quid pro quo*, the Third Circuit explained that the statute nonetheless *does* require a nexus between the gift and an official act:

> What is proscribed, simply put, is a public official's receipt of a gratuity, to which he was not legally entitled, given to him in the course of his everyday duties, *for or because of any official act performed or to be performed by such public official, and* he was in a position to use his authority in a manner which could affect the gift-giver.

Id. at 69 (emphasis added).[10] The Independent Counsel relies upon the Third Circuit's requirement that the public official must be "in a position to use his authority in a manner which could affect the gift-giver" but ignores the fact that the court *also requires* that the gift be made "for or because of any official act performed or to be performed by such public official." The Independent Counsel thus attempts to re-write *Niederberger* by replacing the term "and" with an "or."

In *United States v. Standefer*, 610 F.2d 1076 (3d Cir. 1979) (*in banc*),[11] a companion case to *Niederberger*, the Third Circuit accepted the case for *in banc* review to address a single issue:

> what effect, if any, should Niederberger's acquittal on three of the counts brought against him . . . have on Standefer's conviction for aiding and abetting Niederberger in committing the acts charged in those counts.

Id. at 1078, 1081. In the *"Facts"* section of the decision, the Third Circuit recapped — as nonbinding *dicta* — its holding in *Niederberger* that the gratuity statute "prohibits the giving or offering of gratuities to a public official *for the performance of an official act.*" *Id.* at 1079 (emphasis added). After distinguishing the bribery and gratuity statutes, the court expressed its opinion that sufficient evidence supported the

10. The Third Circuit relied upon the D.C. Circuit's decision in *Brewster*, which firmly supports the Court of Appeals' decision. 580 F.2d at 69 (citing *United States v. Brewster*, 506 F.2d 62, 72 n.26 (D.C. Cir. 1974)); *see also* Pet. App. 7-8.

11. *See* discussion *infra* at Part II for an explanation of this Court's decision in *Standefer*.

jury's finding that Standefer's gifts to Niederberger were "for or because of" Niederberger's *audit* of Standefer's company and not purely for reasons of friendship or social purposes. *Id.* at 1080-81. An audit, of course, constitutes an "official act" that properly supports a gratuity conviction.[12]

The Fifth Circuit's two gratuity cases cited by the Independent Counsel, while containing troubling language, do not address the precise issue raised in the petition. In *United States v. Evans*, 572 F.2d 455 (5th Cir.), *cert. denied*, 439 U.S. 870 (1978), Evans, an official with the Department of Health, Education and Welfare ("HEW"), was charged with accepting money and other compensation from individuals seeking government contracts with the HEW. Evans challenged the sufficiency of the evidence — not the District Court's instructions. Because the court chose not to quote, even in relevant part, from the jury instructions, the parties

12. The Independent Counsel relies upon *dictum* elsewhere in the "*Facts*" section in *Standefer* that "[a]ll that was required in order to convict Standefer was that the jury conclude that the gifts were given by him for or because of Niederberger's official position. . . ." 610 F.2d at 1080. But the court gives no guidance as to what it meant by the phrase "official position." To be sure, if the court intended to establish a "for or because of the official's position" standard, it would have indicated that it disagreed with its interpretation of the gratuity statute reflected in *Niederberger*, which the court decided merely one year earlier. The Independent Counsel's interpretation of this statement also directly conflicts with *Standefer*'s holding that the gratuity statute "prohibits the giving or offering of gratuities to a public official for the performance of an official act." *Id.* at 1079. In addition, the District Court's decision on the gratuity issue — which the Third Circuit panel (the last court to address that issue) affirmed — specifically held that it

> was sufficient that the gratuities to which he was not legally entitled were given to [the official] in the course of his everyday duties for or because of official acts performed or to be performed by him *and* where he was in a position to use his authority in a manner which could affect the gift giver.

United States v. Standefer, 452 F. Supp. 1178, 1183 (W.D. Pa. 1978) (emphasis added) (citing *Alessio*, 528 F.2d 1079). Finally, the jury was not instructed that it could convict Standefer under a status gratuity standard. Nor did Standefer challenge the gratuity jury instructions on that ground. *See* discussion *infra* at Part II.B.

and this Court are unable to compare the respective charges to determine whether a conflict might in fact exist.

The court also rejected Evan's argument that the government had to prove a *quid pro quo*, holding that Evans confused the standards for bribery and an unlawful gratuity:

> Evans sets up the proverbial "straw man" by searching the record for some evidence of *quid pro quo*: some evidence of an "official act," either in fact or the then present capability, on his part directly corresponding to the payment by [the giver of the gratuity]. . . . [The gratuity statute], in general, prohibit[s] the acceptance by a government official of any extraneous compensation or thing of value *for official conduct*. More specifically, it is not necessary that the official actually engage in identifiable conduct or misconduct nor that any specific *quid pro quo* be contemplated by the parties nor even that the official actually be capable of providing some official act as quid pro quo at the time.

Id. (emphasis added). This statement tracks the statutory language, correctly distinguishes the intent requirement of bribery from that of an unlawful gratuity violation and is consistent with the Court of Appeals' decision; "official conduct" merely is another phrase for "official acts." Although holding that the prosecutor need not prove a *quid pro quo*, *Evans* does not eviscerate the link under the gratuity statute between the gratuity and an official act. In fact, the existence of such a "link" does not appear to have been an issue on appeal. Accordingly, *Evans* is easily distinguishable.[13]

The Fifth Circuit's decision in *United States v. Bustamante*, 45 F.3d 933 (5th Cir.), *cert. denied*, 516 U.S. 973 (1995), which merely applies the reasoning of *Evans* to the conduct of an elected official, is similarly distinguishable. Bustamante was a United States

13. The *Evans* court found that the givers of the alleged unlawful gratuities "were actively trying to keep Evans 'happy' *while they contemplated seeking a government contract*. . . ." 572 F.2d at 481 (emphasis added). The evidence also reflected specific, official acts Evans performed on behalf of the givers of the gratuities. *Id.* at 481-42. Accordingly, the court held that *the jury* appropriately found that the gifts in *Evans* were given and received for or because of an official act.

Representative who allegedly accepted certain loan guarantees and an invitation to participate in a risk-free investment in a communications company so that Bustamante would "assist" the company — *i.e.*, take certain actions "in his official capacity" — to obtain a television station license from the Federal Communications Commission. *Id.* at 941.

As in *Evans*, the court rejected a sufficiency of the evidence challenge that "the government was required to prove that the gratuity was given in exchange for an official act" because that is the bribery — not the unlawful gratuity — standard. The appeal from the gratuity conviction was thus predicated upon whether there existed sufficient evidence from which a reasonable jury could convict, not whether the jury charge was proper. *Id.* Neither the Independent Counsel, Sun-Diamond nor this Court can determine whether the charge was sufficiently similar to, or different from, that given to the jury in the *Sun-Diamond* trial, or whether the instructions were consistent with or contradicted the Court of Appeals' decision.[14]

Accordingly, neither *Evans* nor *Bustamante* addresses the narrow issue of law presented here — whether, under the gratuity statute, a gift to a public official is deemed *as a matter of law* to be "for or because of any official act" merely if the gift was given for or because of the official's position. Nor do these cases — neither of which directly conflicts with the Court of Appeals' holding — present grounds for granting the Independent Counsel's petition.

In sum, all of the federal circuit decisions construing the gratuity statute are either consistent with the Court of Appeals' holding or fail to address the precise issue raised in the government's petition. Nor, as addressed in the next section, does the Court of Appeals' decision conflict with Supreme Court precedent.

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14. The Independent Counsel further misconstrues *Bustamante*'s holding that "the jury need not find that the official accepted the gratuity with the intent to be influenced" as supporting the Independent Counsel's position. *Id.* at 940; *see also* Pet. at 19. This statement is unremarkable as it describes a bribery violation.

II.

THE INDEPENDENT COUNSEL MISCONSTRUES THE COURT'S DECISION IN *STANDEFER V. UNITED STATES*.

That the Independent Counsel did not even cite to *Standefer v. United States*, 447 U.S. 10 (1980), until his petition for rehearing in the Court of Appeals is itself telling.[15] The Independent Counsel is not alone in having missed the purported holding of this Court; neither the Court of Appeals nor any other court has ever cited to the Court's decision in *Standefer* to support the criminalization of gratuities based solely on an official's position, despite the fact that *Standefer* has been around for nearly two decades. These omissions, however, are not without reasons as: (1) the Court did *not* address the "for or because of any official act" language in the gratuity statute; and (2) in any event, the instructions in *Standefer* support — rather than conflict with — the Court of Appeals' decision.

A. Standefer Did Not Address the Gratuity Issue Raised in this Case.

As discussed above, a jury convicted Standefer of aiding and abetting an IRS officer's acceptance of illegal gratuities in the form of paid trips and vacations. Niederberger was in charge of auditing the federal income tax returns of Standefer's employer, Gulf Oil Corp. ("Gulf"). Standefer argued that he could not be found guilty of aiding and abetting Niederberger's commission of those federal crimes because a jury acquitted Niederberger. *Id.* at 13-14. Standefer also asserted that the trial court improperly instructed the jury that "whether the [tax] returns of Gulf . . . were correct or not is not relevant to their deliberations in the case," thereby purportedly precluding Standefer from showing that he lacked the requisite criminal intent. *Standefer*, Petition for Writ of Certiorari at 4.[16] The District Court disagreed with Standefer, and the Third Circuit affirmed the conviction.

In his Petition for Writ of Certiorari, Standefer raised *only* the following issues:

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15. Even the Independent Counsel acknowledges the weakness of this argument when asserting that "the D.C. Circuit's decision is *arguably* inconsistent with a prior decision of this Court." Pet. at 24 (emphasis added).

16. Page citations are to the version of this document available through LEXIS. *See* Pet. at 25 n.13.

1. Can a defendant be convicted of aiding and abetting a principal when the only named principal, who must be an employee of the Government of the United States to have committed the substantive offense, has been acquitted by a jury of committing the substantive offense of which the aider and abetter is charged

2. Does not the interpretation of the *aider and abetter statute* by the court below create a new substantive crime which Congress never intended by:

> a) allowing an aider and abettor to be convicted when the principal is tried by a jury and acquitted;
>
> b) eliminating the need that an aider and abettor have specific criminal intent in order to be found guilty of aiding and abetting;
>
> c) allowing the charge of the court below to eliminate from the consideration of the jury the correctness of returns audited by the Internal Revenue Service agent in determining the issue of intent where the jury after deliberation asked the court whether intent was to be considered in its deliberations.

Id. at 3-4 (emphasis added). Standefer did not even cite to 18 U.S.C. § 201 as one of the "Federal Statutes and Federal Issues Involved." *Id.* at 3. And nowhere in his petition did Standefer seek Supreme Court review on the question of whether the government must prove that the defendant intended to influence or reward an official act; indeed, he could not have because the instructions actually required a nexus between the gift and an official act. *See infra*, n.19-20. Nor did the Court take up or address this issue. Instead, the Court

> granted certiorari in this case to decide whether a defendant accused of aiding and abetting in the commission of a federal offense may be convicted after the named principal has been acquitted of that offense.

Standefer, 447 U.S. at 11.

The Independent Counsel's heavy reliance upon a two-sentence footnote in the Court's *Standefer* decision is misplaced. The Court

noted that the "Petitioner also challenges the instructions to the jury on criminal intent. We agree with the Court of Appeals that the instructions were correct." *Id.* at 14 n.8. To be sure, however, this Court's *dictum* did not intend to bless every word of the instructions.

Standefer's challenge to the jury instructions on criminal intent simply did not turn on the "for or because of any official act" language of the gratuity statute. Instead, Standefer's challenge turned on the relationship between the aiding and abetting statute, 18 U.S.C. § 2, and the gratuity statute. More specifically, Standefer raised two challenges to the jury instructions on criminal intent: (1) the trial court did not obligate the government to show an agreement between Standefer and Niederberger that Niederberger would commit "an official act," which Standefer argued was required by the aiding and abetting statute; and (2) the trial court precluded the jury from taking into consideration in determining Standefer's intent the alleged facts that the audits conducted by Niederberger were correct and that Gulf paid more than $150 million in taxes as a result of those audits. Brief for Petitioner at 8, 10; *see* comment *supra*, note 16.[17]

In contrast, Sun-Diamond has never argued that the Independent Counsel was required to show either an *agreement* between Espy and Sun-Diamond or that Espy was influenced in any way as a result of the

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17. In his principal brief, Standefer argued:

> The definitions of aid and abet all necessarily convey the fact that two persons must act in preconcert with an agreement as to their purpose. The court, on the other hand, charged the jury:
>
> ". . . it is not necessary to show any agreement by or with Niederberger as to any particular act or acts or duties to be performed or done, but only that something of value was given to him for or because of an official act performed or to be performed by him in the course of his duty."
>
> * * * *
>
> The court had taken from the jury the crucial fact of the defense that every audit that was performed was performed properly. . . . The argument made to the trial judge that the correctness of the audits was a fact to be weighed by a jury and was a factual determination on a highly important element of whether or not in fact there was a crime committed.

Brief for Petitioner at 8, 10.

gifts. Because the District Court in *Standefer* never dispensed with the "for or because of an official act" language in the jury's instructions, as the District Court did here, that issue was never raised in *Standefer* — at either the District Court, the court of appeals or this Court.

It is thus no surprise that the Court of Appeals, in denying the Independent Counsel's petition for rehearing, confirmed Sun-Diamond's position that *Standefer* has no bearing upon the issues in this case:

> Standefer's briefs in the Supreme Court and the Third Circuit's unpublished panel opinion, *United States v. Standefer*, 1979 WL 4863 (3d Cir. 1979), . . . make clear that the defendant's challenge was to the absence of a *quid pro quo* requirement, and to the trial court's refusal to instruct the jury that the defendant's gifts to an I.R.S. agent had not in fact resulted in the favorable audit sought by the donor. *Id.* at *4-8.

Pet. App. 11 n.5. Because the parties to *Standefer* did not seek Supreme Court review on the proper construction of the statute's "for or because of any official act" language, this Court did not address, and could not have addressed, the issue presented by the Independent Counsel here.

B. The Court of Appeals' Holding Is Consistent with the Jury Instructions in Standefer.

In any event, the *Standefer* District Court instructions more closely parallel the Court of Appeals' than the Independent Counsel's interpretation of the gratuity statute. As these instructions make clear, the jury was required to find that the gifts (paid vacations) were motivated by a desire to reward some past *official act* (favorable tax audits). The District Court specifically instructed the jury that:

> It is sufficient if the defendant made these payments because of [a] desire to create a better atmosphere with Niederberger *with respect to the performance of the audit or appreciation for a speedy or favorable audit.*

Instructions at 16-17.[18] Payments for a "better atmosphere" were insufficient; instead, the District Court required a nexus to a specific

18. The "Instructions" page citations refer to the jury charge found in the *Standefer* Appendix filed with this Court and available in LEXIS. *See* Pet. at 25 n.13.

act. And even a casual reading of the jury's instructions in *Standefer* shows repeated references to this requirement in the body of the instructions, *see* Instructions at 15-20,[19] two supplemental instructions, *id.* at 28-29 (defendant's requested instructions Nos. 7 and 8), and an answer by the District Court to a jury question,

19. The jury instructions in *Standefer* included the following:

> Now you will see, therefore, that the essential elements of this offense which must be proved by the government beyond a reasonable doubt are . . . third, that the defendant did give, offer or promise anything of value to him *for or because of an official act performed or to be performed by him*; . . . and fifth, that such gift was with the purpose of giving a thing of value *for or by reason of the official act performed or to be performed by him.* . . . [Instructions at 15-16]
>
> It is important for you to understand that in order to find this defendant guilty of giving, offering or promising anything of value to Agent Niederberger *for or because of any official act performed or to be performed by him.* . . . [t]he evidence . . . must show to your satisfaction beyond a reasonable doubt that the defendant gave something of value to a public official *for or because of any official act performed or to be performed by such official.* [*Id.* at 16]
>
> * * *
>
> I will also say to you it is not necessary to show any agreement by or with Niederberger as to any particular act or acts or duties to be performed or done, but only that something of value was given to him *for or because of an official act performed or to be performed by him* in the course of his duty. [*Id.* at 17]
>
> Thus the government must prove to you beyond a reasonable doubt as to these 201(f) charges that the defendant willfully and knowingly . . . gave something of value to the agent *because of official acts performed or to be performed by the agent.* . . . [*Id.* at 18]
>
> I must say to you, however, that if on the other hand these acts in making these gifts to Niederberger had nothing to do with giving of things of value to a public official *for performance of acts to be performed by him*, but on the contrary, as contended by the defendant, these things were given as a matter of friendship or for social purpose only, then you should acquit the defendant. [*Id.* at 18-19]

(Emphases added.)

id. at 46-50 ("it is necessary that you find that the defendant did intend to give gratuities . . . for the purpose or because of an official act").

A thorough reading of these instructions finds none that permitted the jury to convict on the Independent Counsel's theory in this case that gifts motivated solely by an official's status or position run afoul of the statute, regardless of whether the donor had any intent to affect or to reward official acts.[20] As the Court of Appeals observed:

> [T]he instructions in *Standefer*, reprinted in relevant part in the Third Circuit's panel opinion, *id.* at *5, *6, were far narrower than the charge in this case, repeatedly emphasizing the requirement that the gifts be given for or because of tax audits performed by the donee.

Pet. App. 11 n.5.

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20. The closest the District Court in *Standefer* came to the Independent Counsel's proposed instruction was as follows:

> If you conclude beyond a reasonable doubt that the vacations . . . were given to Niederberger, knowing that he was in a position to use his authority in a manner which would affect the conditions of the audit, then you *could* find that the things of value were given to him because of Niederberger's exercise of his authority, that is, *for or because of any official act performed or to be performed.* [Instructions at 17]

(Emphases added.) The district court below substituted the word "must" for "could." Sun-Diamond does not contest (and has never contested) that a jury is free to infer based on the authority of a donee that gifts made to him were — or were not — "for or because of any official act." In the instant case, however, the jury was *not* free to reach its own conclusion. Instead, the jury was instructed that the giving of a gift to Secretary Espy was unlawful so long as the gift was motivated by his position — even if there was no intent to influence or reward any official act. *See* Pet. App. 5-8. Thus, where *Standefer* left the ultimate issue to the jury, the District Court below took the issue of whether the gifts were "for or because of any official act" away from the jury.

III.

THIS CASE DOES NOT CONCERN AN IMPORTANT FEDERAL QUESTION WARRANTING SUPREME COURT REVIEW.

As the Court of Appeals applied the actual language of the gratuity statute to conclude that it "means what it says," that decision poses no "serious obstacle to the federal prosecution of official corruption and the restoration of public confidence in governmental integrity." Pet. App. 12; Pet. at 22. Nor, as reflected above, does the decision conflict with any other federal court of appeals decision or otherwise subject federal officials in the District of Columbia to a different — and lower — unlawful gratuity standard than that imposed by Congress. Although these facts are sufficient to reject the Independent Counsel's petition, the issue presented here does not warrant Supreme Court attention for the following, additional reasons.

First, as indicated by the petition and this brief, very few cases in the past several decades have even tangentially addressed this issue.[21] In fact, most of the "gratuity" cases cited by the parties do not even construe the phrase "for or because of any official act performed or to be performed . . . ." And the decision below is the *only* case directly addressing the precise issue raised here, *i.e.*, whether a jury may acquit a defendant charged with violating the gratuity statute if the jury finds that the defendant gave a thing of value to a public official for or because of the official's position but not for or because of any official act performed or to be performed by the official.

Significantly, this case provides an inappropriate vehicle to render a decision with potentially broad consequences because the instant case involves unique facts and circumstances. In altering the statutory language, the District Court precluded Sun-Diamond from proffering a defense that the company's gifts to Espy were *not* "for or because of any official act," but rather were motivated by other, legitimate reasons. For instance, Larry Busboom, Sun-

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21. In comparison, Sun-Diamond is filing a cross-petition for certiorari, which concerns general, corporate imputation principles and so-called "honest services" fraud. *See* 18 U.S.C. §§ 1343, 1346. These issues arise virtually every day in courtrooms around the country.

Diamond's former President, testified at trial that the gifts to Espy by Sun-Diamond were (1) to foster Douglas's information network; (2) to develop personal relationships with other high-level government officials; and (3) to enhance Douglas's status in the agricultural and lobbying communities by being seen with a Cabinet Secretary.[22]

Moreover, this case, unlike most gratuity cases, involves an uncontested, *legitimate* friendship that spanned more than 25 years between the giver and the receiver of the purported unlawful gratuity. *See* Pet. App. 2; Brief for Appellant at 3-5 (filed September 15, 1997); *see also* Joint Appendix filed in Court of Appeals, Tab 3 at 963 (Independent Counsel conceding in closing argument that "nobody is saying that [Douglas and Espy's] friendship wasn't real"). These unique facts render this case distinguishable from virtually every other unlawful gratuity case in that the gift could well have been given for or because of Espy's position but *not* for or because of any official act.[23] Therefore, Supreme Court review of this jury instruction issue is premature because any future cases addressing this precise issue will likely follow the D.C. Circuit's well-reasoned decision, and any perceived conflict within the Courts of Appeals will likely resolve itself without intervention by this Court.[24]

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22. *Cf. Sawyer*, 85 F.3d at 731 n.15 ("We do not think that the desire to gain access, by itself, amounts to an intent to influence improperly the legislators' exercise of official duties. The government points to no legislative duty to provide equal access to all members of the public; and, from a practical standpoint, we doubt one exists."); *United States v. Carpenter*, 961 F.2d 824, 827 (9th Cir.), *cert. denied*, 506 U.S. 919 (1992) ("granting or denying access to lobbyists based on levels of campaign contributions is not an 'official act' [sufficient to] form the basis for a charge of extortion or attempted extortion under the Hobbs Act").

23. Sun-Diamond does not dispute Judge Wald's statement that in most cases the distinction between "for or because of any official act" and "for or because of the official's position" is one without a difference. *See* Pet. App. 34. In this case, however, given the conceded long-term and close friendship between Douglas and Espy, the distinction is crucial to Sun-Diamond's defense. In any event, the clear statutory language dictates that this question is for the jury — not the judge — to decide.

24. Justice Harlan acknowledged that

> even where a "true" conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict

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Second, even assuming *arguendo* that the Court of Appeals adopted a gratuity standard more lenient than that established in another circuit, the Independent Counsel ignores the fact that specific statutes and regulations prohibit the type of conduct by federal employees the Independent Counsel asserts also is proscribed by the gratuity statute.[25] Moreover, public opinion, debarment and similar sanctions act to deter government officials and regulated parties from running afoul of ethics policies concerning government officials. In short, the Court of Appeals' decision will not eviscerate "governmental integrity" because multiple safeguards exist to ensure that members of the public, as well as public officials, do not violate basic conflict of interest rules, even if some of those rules do not rise to the level of criminal conduct.

Finally, to the extent that the Independent Counsel believes that the terms of the gratuity statute provide for a standard that is too lenient, this is an issue for Congress, not for this Court. *See, e.g., United States v. Mezzanatto*, 513 U.S. 196, 216 n.1 (1995) (Souter, J., dissenting) ("If the Government believes that the better rule is different from what is currently the law, the Government can petition Congress to change it.") (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)); *Watt v. Alaska*, 451 U.S. 259, 285 n.10 (1981) (Stewart, J., dissenting) ("It would be far more appropriate, given the constitutional allocation of lawmaking power to Congress and not to the courts, if this Court were to respect the plain meaning of the statute, and leave it to Congress to make any changes it thinks necessary."); *see also United States v. Generes*, 405 U.S. 93, 115

(Cont'd)

> may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences. . . .

Justice Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 Austr. L.J. 108, 112 (1959).

25. *See, e.g.*, 5 U.S.C. § 7353; 5 C.F.R. § 2635.202(a) (prohibiting executive branch employees from, directly or indirectly, soliciting or accepting gifts "because of the employee's official position"); Rule XXXV of the Standing Rules of the Senate (amended July 18, 1995); Rule LII of the Rules of the House of Representatives (amended October 16, 1995); *see also* 9 C.F.R. § 203.2 (Department of Agriculture regulation concerning gifts from packers of meat to government employees).

(1972) (Douglas, J., dissenting) ("Resort to litigation, rather than to Congress, for a change in the law is too often the temptation of government which has a longer purse and more endurance than any taxpayer.") (citation omitted).

IV.

THE COURT OF APPEALS CORRECTLY INTERPRETED THE GRATUITY STATUTE BY ADHERING TO ITS EXPRESS LANGUAGE.

"If the statute is clear and unambiguous 'that is the end of the matter, for the court . . . must give effect to the unambiguously expressed intent of Congress.' " *Sullivan v. Stroop*, 496 U.S. 478, 482 (1990) (citations omitted). Despite the Independent Counsel's arguments, the Court of Appeals applied the gratuity statute as it is written to hold correctly that the District Court's jury instructions were erroneous and improperly precluded Sun-Diamond from presenting certain defenses to the jury. Although the Independent Counsel argues that the term "official act" means "official position," this assertion is belied by Congress's decision to define "official act" as

> any *decision or action* on any question, matter, cause, suit, proceeding or controversy, which may at any time be pending, or which may by law be brought before any public official, in such official's official capacity, or in such official's place of trust or profit.

18 U.S.C. § 201(a)(3) (emphasis added). By defining "official act" as some "decision or action," Congress made clear that it did not deem "official position" a synonym for "official act." Indeed, this Court in *United States v. Brewster*, 408 U.S. 501 (1972), recognized that

> [t]o sustain a conviction [under a predecessor gratuity statute,] it is necessary to show that [the defendant] solicited, received, or agreed to receive, money with knowledge that the donor was paying him compensation *for an official act*.

Id. at 527 (emphasis added); *see also id.* at 553 (White, J., dissenting) (the predecessor gratuity statute "requires proof of a defendant's receipt, or an agreement or attempt to receive, anything of value 'for or because of any official act performed or to be performed by

him. . . . ' . . . *[W]hatever the act, the Government must identify it to prove its case.*") (emphasis added).

Applying the statute's plain meaning, the Court of Appeals correctly held that:

> To satisfy the criminal intent requirement embodied in the phrase "for or because of any official act," the giver must intend either to reward some past concrete official act or acts, or to enhance the likelihood of some future act or acts.
>
> * * *
>
> Given that the "for or because of any official act" language in § 201(c)(1)(A) means what it says, the jury instructions invited the jury to convict on materially less evidence than the statute demands — evidence of gifts driven simply by Espy's official position. The difference may not seem very great, for whenever a donor has matters actually or potentially pending before his donee, gifts motivated by the latter's position will usually also be motivated by a desire to reward or elicit favorable official action. *But the terms of the statute require a finding that the gifts were motivated by more than merely the giver's desire to ingratiate himself with the official generally, or to celebrate the latter's status.*

Pet. App. 7, 12-13 (emphasis added).[26]

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26. It is "unnecessary" to track the statutes' legislative history "in light of the plain meaning of the statutory text." *Darby v. Cisneros*, 509 U.S. 137, 147 (1993). Nonetheless, the legislative history supports the Court of Appeals' holding and demonstrates that Congress did not intend to criminalize conduct "for or because of the official's position." As with most legislation, the gratuity and conflict of interest (18 U.S.C. § 203) statutes were subject to legislative compromise. Senator Keating offered an amendment to address a void in the proposed laws related to "gifts to Federal employees." *See* S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3867 (individual views of Senator Keating). The amendment would have:

> prohibit[ed] any Government employee from soliciting or accepting any gift from any person where the employee has reason to believe that such person (a) is seeking to obtain

(Cont'd)

Other circuit court decisions have adopted the reasoning reflected in the decision below. In addition to the cases miscited by the Independent Counsel, the First Circuit in *United States v. Sawyer*, 85 F.3d 713 (1st Cir. 1996), construed a virtually identical state gratuity statute[27] to hold that "[t]he statute does *not* read 'for or because of the official's position.' Rather, it forbids gratuities motivated by 'any official act' and further defines, rather meticulously, 'official act.' " *Id.* at 735 (emphasis in original). The First Circuit required a nexus between the gift and an "official act" throughout its opinion to give effect to the statutory language. *See id.* at 736 ("statute proscribes gratuities motivated by 'official acts' rather than 'official position' "); *id.* at 730 ("As the word 'gratuity' implies, the intent most often associated with the offense is the intent to 'reward' an official for an act taken in the past or to be

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> contractual or other business or financial relationships with the employee's agency or (b) conducts operations or activities which are regulated by the employee's agency, or (c) has interests which may be substantially affected by the employee's performance or nonperformance of his official duties.

Id. But Congress chose *not* to adopt this amendment. *See also* July 10, 1960 Letter from R. Kramer to E. Celler, *reprinted in* Hearings on H.R. 2156 Before the Antitrust Subcommittee of the Committee of the Judiciary, 86th Cong., 2d Sess., 613 (1960) ("for or because of *such act*") (emphasis added); Staff of Subcommittee No. 5 of the House Committee of the Judiciary, 85th Cong., 2d Sess., Federal Conflict of Interest Legislation, a Staff Report to the Subcommittee No. 5 of the Committee of the Judiciary, House of Representatives, Parts I & II, 62, 71-72 (Comm. Print Mar. 1, 1958) (referring to criminalizing of gifts given "as a reward for an official act").

27. The Massachusetts gratuity statute at issue in *Sawyer* stated in pertinent part:

> Whoever, otherwise than as provided by law for the proper discharge of official duty, directly or indirectly gives, offers or promises anything of substantial value to any present or former state . . . employee . . . *for or because of any official act performed or to be performed by such an employee* . . . [commits a felony].

Mass. Gen. Laws. ch. 268A, § 3(a), (d) (emphasis added); *see also id.* § 1(h) (defining "official act" as "any decision or action in a particular matter or in the enactment of legislation").

taken in the future"); *id.* at 736 ("the use of the term 'official act' appears to ensure that the gratuity would be deemed unlawful only when the giving of an item of 'substantial value' is linked to the official's performance of duties"). Similarly, the Eighth Circuit in *United States v. Patel*, 32 F.3d 340 (8th Cir. 1994), approved a gratuity jury instruction requiring the government to "prove, beyond a reasonable doubt, that the defendant intended to reward [the government official] for past action or action [the official] was already committed to take." *Id.* at 345 (quoting jury instructions). Nor are these decisions anomalous.[28]

Perhaps the Independent Counsel's interpretation of the gratuity statute stems from a misunderstanding of the distinction between a bribe and an unlawful gratuity. *See* Pet. at 23-24 (asserting that the Court of Appeals' interpretation of an unlawful gratuity is "virtually indistinguishable from a bribe"). An unlawful gratuity is a lesser included offense of a bribery violation, which requires "a more exacting showing of intent"; the bribery — but not the gratuity — statute requires a specific, corrupt intent to elicit a *quid pro quo*. Pet. App. 7; *see also* § 201(b)(1)(A). Thus, where the gratuity statute "carries the concept of the official act being done anyway," the bribery law requires a gift of a thing of value to a public official with a specific intent *to influence* certain action or inaction that the official may not have otherwise performed. *United States v. Brewster*, 506 F.2d 62, 82 (D.C. Cir. 1974) (emphasis added); *see*

28. *See, e.g., United States v. Mariano*, 983 F.2d 1150, 1159 (1st Cir. 1993) (emphasis added) (the gratuity statute "presumes a situation in which the offender gives the gift without attaching any strings, intending it instead as *a reward for actions the public official has already taken or is already committed to take*"); *United States v. Muldoon*, 931 F.2d 282, 287 (4th Cir. 1991) (finding in the case of an unelected official that "[t]he proof need not show that the payor intended to exact action by the recipient, although it must show that the payor gave the gratuity because of the act"; "an illegal gratuity is a payment made for an act by the recipient that might have been done without any payment"); *United States v. Previte*, 648 F.2d 73, 82 (1st Cir. 1981) (holding that the gratuity statute has two components: (1) that the alleged gifts be made for or because of an official act; and (2) that the defendant receive the gift "with a certain guilty knowledge, . . . *i.e.*, with 'knowledge that the donor was paying him compensation for an official act.' ") (citations omitted); *see also* cases cited by the Independent Counsel, discussed *infra*.

also United States v. Nardello, 393 U.S. 286, 293 n.11 (1969) ("Bribery has traditionally focused upon corrupt activities by public officials."); *United States v. Gatling*, 96 F.3d 1511, 1522 (D.C. Cir. 1996) ("[p]ayments to a public official for *acts* that would have been performed in any event . . . are probably illegal gratuities rather than bribes") (emphasis added) (quoting *United States v. Campbell*, 684 F.2d 141, 148 (D.C. Cir. 1982)).[29]

The Court of Appeals grasped this distinction when explaining that although a *quid pro quo* need not be shown to prove a violation of the gratuity statute, the "official act" language is not superfluous:

> [T]o say that the gratuity provision lacks a *quid pro quo* requirement is not to read the "official act" language out of the statute. It is only to say that, in contrast to bribery, the gratuity and the official act need not each motivate the other. *But the gratuity statute by its terms does still require at least a unidirectional relationship — the gift must be "for or because of" the act.*

Pet. App. 8 (emphasis added).

The Court of Appeals thus rejected the District Court's instructions which rendered Sun-Diamond's intent irrelevant and relieved the Independent Counsel of his burden of proving every element of the gratuity offense beyond a reasonable doubt. In fact, the District Court effectively established an irrebuttable presumption that Sun-Diamond gave gifts to Espy "for or because of an[ ] official act" merely because the company provided Espy with things of value while he was in a position to take official action affecting Sun-Diamond. In so doing, the District Court deprived Sun-Diamond of its constitutional right to present this issue to the jury. And this is why the Court of Appeals reversed Sun-Diamond's gratuity conviction.

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29. *See also Brewster*, 506 F.2d at 82 (defining "corrupt" as "incorporating a concept of the bribe being the prime mover or producer of the official act"); *United States v. Strand*, 574 F.2d 993, 995 (9th Cir. 1978) (same proposition).

CONCLUSION

For the reasons given above, it is respectfully submitted that the Court's discretionary jurisdiction should not be invoked and the Independent Counsel's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT DATED MARCH 20, 1998

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 97-3072 **September Term, 1997**

96cr00193-01

United States of America, Appellee

v.

Sun-Diamond Growers of California, Appellant

Before: WILLIAMS, HENDERSON AND TATEL, *Circuit Judges.*

ORDER

It is ORDERED by the Court that the opinion of March 20, 1998 be amended as follows:

Page 11, line 9, before "*Umans*," insert a footnote 5 as follows and renumber the rest of the footnotes.

5. The independent counsel's briefs made no mention of *Standefer*, but in a petition for rehearing he notes that the Supreme Court, in affirming the judgment on other grounds, *Standefer v. United States*, 447 U.S. 10 (1980), said in a footnote that "the instructions to the jury on criminal intent" were "correct." *Id.* at 14 n. 8. Standefer's briefs in the

Appendix A

Supreme Court and the Third Circuit's unpublished panel opinion, *United States v. Standefer*, 1979 WL 4863 (3d Cir. 1979), however, make clear that the defendant's challenge was to the absence of a *quid pro quo* requirement, and to the trial court's refusal to instruct the jury that the defendant's gifts to an I.R.S. agent had not in fact resulted in the favorable audit sought by the donor. *Id.* at *4-8. In any event, the instructions in *Standefer*, reprinted in relevant part in the Third Circuit's panel opinion, *id.* at *5, *6, were far narrower than the charge in this case, repeatedly emphasizing the requirement that the gifts be given for or because of tax audits performed by the donee.

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Eva Brown
Deputy Clerk